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**Green Valley Manor, L.L.C. and Patricia Baker, Paris Banks, and Rashanda Barfield.** Cases 14–CA–29124, 14–CA–29125, and 14–CA–29160

February 17, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAMBER

On May 22, 2008, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief; the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified below and to adopt his recommended Order<sup>2</sup> as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> For the reasons set forth in his decision, we affirm the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Patricia Baker, Paris Banks, and Beverly Glover. We also affirm the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating Glover, Marilyn Salome, and Antoinette Randolph, and by calling the police in response to union handbilling. We find it unnecessary to pass on the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating Terrell Noble and by ordering union handbillers to leave and threatening to call the police if they did not; these findings would be cumulative and would not materially affect the remedy.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by calling the police in response to union handbilling, we note that (1) the Respondent did not establish that it held a good-faith belief that the handbilling was blocking the nursing home's driveway; (2) although Respondent Office Manager Mary Melendez testified that the handbilling was "almost blocking" the driveway, neither her testimony nor the record as a whole explains what "almost blocking" meant; (3) the record fails to establish that the handbilling was occurring on the Respondent's property; and (4) the Respondent's contention, that the police officer was not responding to a call from the Respondent when he spoke to union handbiller Sharon Nelson, is without merit, as the record shows that the Respondent called the police twice that afternoon—once in response to the handbilling and once in response to an incident involving a discharged employee—and the police came to the nursing home twice.

<sup>2</sup> We shall modify the judge's recommended Order and substitute a new notice to conform to the violations found and to include the Board's standard remedial language.

<sup>3</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

The Discharge of Employee Rashanda Barfield

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Rashanda Barfield. Applying a *Wright Line*<sup>4</sup> analysis, the judge found that (1) the General Counsel met his initial burden of proving that Barfield's union activity was a motivating factor in the Respondent's discharge decision, and (2) the Respondent did not prove that it would have discharged Barfield absent her union activity. The Respondent challenges both findings. As explained below, we assume arguendo that the General Counsel met his initial burden under *Wright Line* but nevertheless find that the Respondent met its rebuttal burden of proving that it would have discharged Barfield even in the absence of her union activity. See *Blue Diamond Growers*, 353 NLRB No. 6, slip op. at 1 fn. 4 (2008).<sup>5</sup>

The Respondent operates a nursing home. Barfield was employed as a certified nursing assistant (CNA) and, as such, her principal responsibilities involved caring for the nursing home residents. On July 31, 2007, Service Employees International Union Local 2000 (the Union) began an organizing campaign at the Home. On that day, Barfield met with Union Organizer Sharon Nelson and signed a union authorization card.

The credited testimony shows that, on five separate occasions during the morning of August 7, 2007, Home Administrator Marilyn Law observed Barfield, who was on duty at the time, go to the Home parking lot and sit in her car for a few minutes each time. Law reported Barfield's conduct to Nursing Director Elaine Fraenhoffer who, in turn, confirmed with Barfield's charge nurse that Barfield had not obtained permission to leave her assigned work area. Barfield knew that the Respondent's rules prohibited on-duty employees from leaving the work area without the charge nurse's permission.

That afternoon, Fraenhoffer discharged Barfield. During the discharge conversation, Barfield initially denied that she had gone to her car. When Fraenhoffer told Barfield that Administrator Law had seen Barfield go to the car, Barfield changed her story and admitted she had gone to the car to talk on the phone. The Respondent's discharge summary, written August 7, 2007, by Nursing Director Fraenhoffer and approved the same

<sup>4</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1984), cert. denied 455 U.S. 989 (1982).

<sup>5</sup> Accordingly, we find it unnecessary to pass on the judge's finding that Barfield's union activity was a motivating factor in the Respondent's discharge decision.

Because we find that the Respondent proved it would have discharged Barfield even in the absence of her union activity, we also reverse the judge's alternative finding that the Respondent's asserted reason for discharging Barfield was pretextual under *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

date by Administrator Law, describes Barfield's misconduct as follows: "Observed by administrative staff leaving the building for an unauthorized break and sitting in her car five (5) times prior to lunch break. When confronted she denied this had happened, then did admit she was sitting in her car on the phone after being told her behavior was observed."

The record shows that leaving the Home while on duty and without permission is serious misconduct because (a) the Respondent must maintain an adequate staff-to-resident ratio, (b) supervisors must be able to locate employees in order to reassign them as needed, and (c) a CNA's unauthorized absence could jeopardize patient care, particularly if an emergency were to occur. In addition, as the Respondent notes, Barfield was a junior employee, having worked for the Respondent for only 4 months at the time of her discharge.

The judge found that the discharge constituted disparate treatment because discharges "were not taken against other employees for similar offenses" and "the Respondent tolerated shortcomings in other employees." However, the judge cited no specific discipline records to support his disparate treatment finding, and the record does not show that the Respondent imposed lesser discipline for offenses similar to Barfield's misconduct.

The parties submitted records of over 140 warnings, suspensions, and discharges. While none of these records concerns discipline for multiple instances of leaving one's assigned work area, discipline was imposed seven times for a single unauthorized departure from the assigned work area. In four of the seven instances, the employee was discharged<sup>6</sup> and in the other three, the employee received lesser discipline.<sup>7</sup> Here, Barfield left the assigned work area not once, but five times, and falsely denied her misconduct when confronted by Nursing Director Frauenhoffer. In these circumstances the

<sup>6</sup> Corneisha Pitts and Devious Shannon (left facility for 1 hour after charge nurse denied permission to leave); Karrish Barfield (LPN; left facility for over 2 hours without informing other nurses); Charles DeBose (laundry aide; left building without permission leaving laundry unattended and causing nurses to lack clean sheets).

<sup>7</sup> Clarissa Harville (sleeping in the front lobby); Regina Laden (left work early leaving floor unattended); Yolanda Morris (left work early stating clothing soiled and would return but did not return). As noted above, the discipline imposed on each of these employees was for a single act of misconduct.

The General Counsel contends that the Respondent imposed lesser discipline for similar or more serious misconduct than Barfield's, citing discipline of employees Harville (suspension for cell phone use) and Amber Easter (verbal warning for cell phone use and excessive phone calls). However, the cited misconduct is qualitatively different—and less serious—than Barfield's misconduct in that the employees did not leave their assigned work areas and therefore jeopardized patient care to a lesser extent than Barfield.

Respondent's discharge of Barfield is consistent with the Respondent's past disciplinary practice.<sup>8</sup>

We accordingly reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Barfield.

#### The Challenge to Paris Banks' Unfair Labor Practice Charge

The complaint is based on three charges, one of which was filed by employee Paris Banks alleging all four unlawful discharges and all of the 8(a)(1) violations.<sup>9</sup> The Respondent contends that Banks' charge is invalid and asks the Board to dismiss those complaint allegations based solely on Banks' charge. The Respondent's contention relies on Banks' testimony that she did not read the charge before signing it, had no "first-hand" knowledge regarding two of the discharge allegations, and had no information regarding most of the 8(a)(1) allegations. As explained below, we reject the Respondent's contention.

The Act requires that a complaint be based on a charge, but establishes no requirements regarding the charge.<sup>10</sup> Section 102.11 of the Board's Rules provides that the charge "shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury that its contents are true and correct." The Board has explained that the purpose of Section 102.11 is to deter abuse of the Board's processes, and that this deterrence is achieved by subjecting the charging party to criminal sanctions for filing a charge containing false allegations. Accordingly, the critical inquiry is whether the charging party has subjected himself or herself to the risk of such

<sup>8</sup> The General Counsel contends that the Respondent never before discharged an employee for a first offense. However, the record definitively shows that the Respondent discharged at least one other employee (Shatia Hagens) for a first offense. Further, the record contains discharge notices for 11 other employees without any accompanying documents showing prior disciplines (Karrish Barfield, Nikita Williams, Connie Smith, L. Robinson, Shontell Ward, Ellen Gordon, Charles DeBose, Devious Shannon, James Kaufman, Margery Dickens, and Angie Howard).

<sup>9</sup> In his introductory paragraph, the judge incorrectly states that the complaint "is based on charges filed by [the Union], by Patricia Baker and Paris Banks." The original complaint, issued on October 31, 2007, was based on charges filed by the Union, Baker, and Banks. However, on December 6, 2007, the Regional Director issued a prehearing order severing the case based on the Union's charge and amending the complaint to add the case based on Barfield's November 19, 2007 charge.

<sup>10</sup> Sec. 10(b) provides: "Whenever it is charged that any person has engaged in . . . any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint stating the charges in that respect . . ."

criminal sanctions. See *Alldata Corp.*, 324 NLRB 544, 544–545 (1997), and cases cited therein.

Here, Banks' charge satisfies the requirements in Section 102.11—that is, it is in writing, is signed, contains Banks' declaration that the “statements are true to the best of [her] knowledge and belief”, and acknowledges in capital letters that “WILLFUL FALSE STATEMENTS” in the charge “CAN BE PUNISHED BY FINE OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).” The Board's Rules do not require that the charging party read the charge or have information regarding the allegations set forth in the charge. Moreover, by signing the charge, Banks subjected herself to the risk of criminal sanctions if the statements in the charge were false. Accordingly, the purpose underlying Section 102.11—deterring abuse through the threat of criminal sanctions for false statements—was satisfied.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Green Valley Manor, L.L.C., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating its employees concerning their union activities and the union activities of their fellow employees.

(b) Interfering with lawful union handbilling.

(c) Discharging its employees because of their union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the discharges of Patricia Baker, Paris Banks, and Beverly Grover, and offer them full reinstatement to their former jobs, or, if their jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Make whole these employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest as set forth in the remedy section of the judge's decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its St. Louis, Missouri facility copies of the attached notice marked “Appendix.”<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since August 2, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 17, 2009

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Wilma B. Liebman, Chairman

\_\_\_\_\_  
Peter C. Schaumber, Member

#### APPENDIX NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVE YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf.
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you concerning your union activities and the union activities of our employees.

WE WILL NOT interfere with lawful union handbilling.

WE WILL NOT discharge you because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discharges of Patricia Baker, Paris Banks, and Beverly Grover and offer them reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the unlawful discharges and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make Patricia Baker, Paris Banks, and Beverly Grover whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

GREEN VALLEY MANOR, L.L.C.

*Olurotimi O. Solanke, Esq.*, for the General Counsel.  
*Andrew J. Martone, Esq.* and *Allison E. Taylor, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. These consolidated cases were heard before me on December 10, 11, and 12, 2007, in Saint Louis, Missouri. The complaint is based on charges filed by Service Employees International Union Local 2000 (the Union or Charging Party) and by Patricia Baker and Paris Banks, individuals. The complaint alleges

violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint is joined by the answer filed by Green Valley Manor, L.L.C. (Green Valley or the Respondent).

After due consideration of the testimony and evidence received at the hearing and briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Missouri limited liability corporation which operates a skilled care nursing home in Saint Louis County, Missouri, in a two-story building where it provides nursing home services for approximately 100 Medicaid and Medicare residents with physical and mental disabilities including schizophrenia, dementia, Alzheimer's, and other disabilities. Sharo Shirshekan manages the Respondent. He also manages other nursing homes in the St. Louis area and in surrounding areas. He works out of a central office in Farmington, Missouri. The complaint alleges and, although Respondent denies, I find that at all times material herein, the evidence establishes that the Respondent has operated a skilled nursing home providing services to its residents during the 12-month period preceding the filing of the complaint and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a healthcare institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES<sup>1</sup>

A. Background and 8(a)(1) Allegations

1. The advent of the union campaign

Respondent operates a skilled-care nursing home and provides nursing home services to approximately 100 residents, many of whom have physical and mental disabilities. Respondent's Administrator is Marilyn Law who has responsibility for the day-to-day operations and for all financial resident care matters including the review and approval of employee discipline matters. Law reports directly to Shirshekan. Elaine Fraenhoffer is the Director of Nursing (DON) and supervises the nursing staff. She reports directly to Law. Marty Taub was the assistant director of nursing (ADON) during the period at issue in this proceeding and reported to Fraenhoffer. The nursing staff is comprised of registered nurses (RNs), licensed practical nurses (LPNs), certified nurses assistants (CNAs), and certified medical technicians (CMTs). There are three shifts: 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m. CNAs assist residents with personal care such as bathing, feeding, and dressing. CMTs give medication, monitor temperature, check pulses and respiration and assist RNs and LPNs with medical checks. CMTs may also do everything CNAs do. Respondent's activities director is Laura Miloshewski. Taiisha Burgess is a central

<sup>1</sup> All dates in this case are in 2007 unless otherwise stated.

supply employee who orders, processes, and distributes medical supplies for the nursing staff among Shirshekan's nursing homes and also orders and handles medical records. She spends approximately 50 percent of her time at the Green Valley facility. Respondent admits that Law, Frauenhoffer, Taub, and Maintenance Supervisor Luther Sledge are supervisors or agents under the Act. It denies that Miloshewski and Burgess are supervisors or agents under the Act. General Counsel asserts that Miloshewski is part of management because she plans, schedules, and implements activities for residents and reports directly to Law, has an office of her own and employees believe she is part of management. I find based on the foregoing that Miloshewski is an agent of Respondent within the meaning of Section 2(13) of the Act as she has been placed in a position wherein management has given her apparent authority. I also find that the un rebutted testimony of Patricia Baker that she was interviewed and hired by Burgess is sufficient to establish that Burgess is an agent of Respondent under Section 2(13) of the Act as Respondent placed her in a position of apparent authority. As it developed at the hearing, Baker did not know specifically whether Burgess had actually hired her. However, I find the testimony of Baker is sufficient to establish that Burgess was placed in a position of apparent authority.

The events in this case took place during a brief period of time from mid-July to August 10th. About July 16th, CNAs Patricia Baker and Paris Banks, and CMT Beverly Grover and other employees engaged in a discussion of their concerns about their wages, hours, and conditions of employment. The discussion concerned wages, lack of benefits, working double shifts, and concerns about the increase in work load and safety concerns because of Respondent's policy of admitting individuals with serious psychiatric conditions. The idea of seeking out a union came up in this discussion. Banks said that Service Employees International Union Local 2000 represented the employees at another nursing home and the employees had received better benefits. Baker suggested that Grover would be a good shop steward because she spoke out, assisted other employees, and gave them advice. There was an anonymous telephone call received by the Union in late July suggesting that the employees of Respondent might be interested in union representation. Union Organizing Director Sharon Nelson visited Respondent's facility on July 31. She was met by a number of interested CNAs and CMTs, several of whom signed union authorization cards. She met with the employees in a small vending machine room which is part of the dining room. As a result of the large number of employees who were interested in the Union, the vending room was too small to accommodate them and the employees were also in the dining room where Activities Director Laura Miloshewski was conducting an activity for the residents at that time. During this period of about 35 to 40 minutes, employees came and went. Nelson met with Beverly Grover whom employee Shantel Ewing had recommended as a shop steward and spoke to Grover who signed a card and was interested in becoming a shop steward. Baker also signed a card as did Banks and CNA Rashanda Barfield. Baker also gave some cards to employee Ewing who agreed to hand them out to employees on another shift. On the next day (August 1), Nelson returned to the facility to obtain more

signed cards and sat in the vending machine room where she was met by DON Frauenhoffer and ADON Taub who asked her what she was doing there. She told them she was waiting for "Pat." There was only one other "Pat" employed at the facility. Nelson was told to leave the facility. Nelson complied with the order to leave the premises and began to walk out. She was followed by Frauenhoffer and Taub. Baker, who had observed this, had not received any signed cards from employee Ewing who had agreed to pass them out to other employees. When Baker asked Ewing if she had obtained any signed cards, Ewing said that the employees were not interested in the Union and "brushed" Baker off. Baker had observed the DON and ADON approach Nelson and had seen Nelson commence to leave. At that time, Baker was herself coming off her shift and punched out on her time card and walked slowly in the same direction that Nelson was walking to the parking lot to leave the building in an effort so as not to catch up with Nelson as she saw that the DON and ADON were looking. Baker testified she was feeling nervous about the situation. Nelson tried to talk to her and asked about the cards. Baker said she had not received any more cards and was feeling uncomfortable and attempted to otherwise avoid Nelson. Nelson and Baker got in their cars and left the premises.

## 2. The alleged interrogation of employees by DON Frauenhoffer and ADON Taub

Baker testified that on August 2, she was in resident Garth's room which was on the first floor near the nurses' station. She heard Frauenhoffer and Taub come to the nurses' station and heard Frauenhoffer ask LPN charge nurses Marilyn Salome and Antoinette Randolph whether they knew anything about a union representative in the building the last 2 days. Taub also asked if the nurses knew anything about this. Baker testified that one of the nurses asked "what . . . a union?" thus registering surprise at the question. Baker testified that the inquiry frightened her and she finished the room she was working on and left. I credit Baker's specific testimony. Taub was not called as a witness to testify and the nurses were not called to testify. Baker's testimony was not denied by Frauenhoffer nor did Frauenhoffer attempt to explain why the inquiry was made of the nurses. I find Respondent's questioning of the nurses concerning the presence of a union representative and implicitly the union activities of its employees constituted unlawful interrogation and thus violated Section 8(a)(1) of the Act. There was no evidence presented to establish that the nurses were supervisory employees and I, accordingly, find that the nurses were at all times material employees protected by Section 7 of the Act. See *Golden Crest Healthcare Center*, 348 NLRB 727, 730 (2006). I, thus, conclude that the General Counsel has established that the inquiry by Frauenhoffer and Taub concerning the presence of a union representative was unlawful interrogation in violation of Section 8(a)(1) of the Act.

## 3. The alleged interrogation of employees by Supervisor Luther Sledge

The Complaint alleges that Maintenance Supervisor Luther Sledge unlawfully interrogated employees concerning employees' distribution of union authorization cards. Baker testified

that on August 2nd, she returned to the dining room after she took a resident to his room after lunch and she observed Supervisor Sledge, central supply employee Taiisha Burgess and housekeeper Terrell Noble together with other housekeeping staff nearby. Baker heard Burgess ask Noble as to who was soliciting employees to sign union authorization cards. Noble looked at Baker and nodded his head and Sledge and Burgess then looked at Baker and neither Sledge nor Burgess said anything. Only moments later Sledge attended a meeting at which Baker was terminated. I credit the foregoing un rebutted testimony of Baker as Burgess and Sledge did not testify. Nor did Noble or any other employee testify concerning this incident. I find that Burgess was an agent of Respondent within the meaning of Section 2(13) of the Act as she was vested with "apparent authority" authorized by Respondent. Baker testified that Burgess interviewed her, told her the rate of pay and hired her without any evidence that the hire and assignment of her wages, terms and conditions of employment were subject to the approval of another member of management. Under these circumstances, Burgess was vested with apparent authority to engage in the interrogation of its employee Noble, which interrogation was carried out in the presence of other rank and file housekeeping employees. It is undisputed that Sledge did nothing to disavow the interrogation of employees by Burgess. Thus, this interrogation was attributable to Sledge, its undisputed supervisor. *Pan-Oston Co.*, 336 NLRB 305, 305-306 (2001). I find that Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Noble in the presence of Supervisor Sledge.

4. Alleged statement by Director of Nursing Frauenhoffer that she was informed that Grover called the Union and was organizing on behalf of the Union

Grover testified that on August 3rd, between 4 p.m. and 4:15 p.m., she was in a resident's room and Frauenhoffer told her she wanted to speak with her. Grover stepped out in the hallway and Frauenhoffer said, "if you bring this up I am going to deny it." She then told Grover that there was a rumor that she was recruiting women for the Union. Grover denied this and Frauenhoffer asked Grover if she was sure.

Although she denied the incident related by Grover as set out above, Frauenhoffer testified concerning another alleged discussion with Grover wherein she told Grover that any union discussion must be away from patient care areas and during breaktimes or off the property. Frauenhoffer testified she did not know the date this incident took place. General Counsel asserts that this alleged conversation related by Frauenhoffer appears to be the same conversation testified to by Grover but with a totally different story. In her account, Frauenhoffer testifies that she told Grover that her union activities must be outside of patient care areas. Frauenhoffer testified that Grover was disturbing patients and going "rah-rah" for the Union. General Counsel asserts that Frauenhoffer's version should not be credited. General Counsel also contends that Grover's account should be credited as she places the conversation with Frauenhoffer as occurring on Friday, August 3, whereas Frauenhoffer's account that a resident came to her on Saturday, August 4th, to complain about Grover's conduct on a previous

night, does not support the version of Frauenhoffer because Frauenhoffer does not work on weekends. In addition, as contended by General Counsel, Grover's testimony is credible because her account was specific and detailed and logical whereas there is no evidence of any rule or policy prohibiting employees from talking at work and Frauenhoffer acknowledges that she told Grover she could not talk about the Union. General Counsel asserts that Frauenhoffer's ill-tempered and hostile testimony makes it clear that she would not have told Grover that she could continue her union activities but that they must be conducted on breaktime and outside of patient-care areas.

My review of the foregoing and my observation of the demeanor of Frauenhoffer convince me that Grover's version of these events should be credited. Her testimony was specific and logical. I found Frauenhoffer's testimony to be hostile and argumentative and that she often refused to answer the questions put to her and instead shifted into other areas in response to the questions. I find that Respondent, by Frauenhoffer, violated Section 8(a)(1) of the Act by telling Grover that she was aware that Grover had called the Union and was organizing on its behalf. This statement was coercive and had the effect of intimidating its employees by expressing Respondent's displeasure and indicating that the employees' union activities were being watched by Respondent with the logical conclusion that adverse consequences could follow if they engaged in protected concerted activities under the Act by attempting to organize a union or otherwise engaging in union activities. *Ready Mix, Inc.*, 337 NLRB 1189 (2002); *Soltech, Inc.*, 306 NLRB 269, fn. 3 (1992); *Trinity Memorial Hospital*, 238 NLRB 809 (1978).

5. Respondent's alleged interference with lawful handbilling by the Union and by its employees near, but not on, property occupied, but not owned, by Respondent

On August 7th, a payday, Union Organizer Nelson came by Respondent's facility to hand out union flyers to Respondent's employees advising the employees of the upcoming election and advising them of their organizational rights. Nelson parked her vehicle on a public road (Prigge Road) near the driveway to Respondent's facility and commenced to hand out the flyers to individuals. It is undisputed that Administrator Law called the police. However, the evidence also discloses as testified to by Nelson that Nelson did not block the traffic to and from the facility. A police car arrived and the officer drove up to the facility. The officer subsequently left the facility, approached Nelson, and without alighting from his vehicle asked Nelson what she was doing. She told him she was handing out union flyers. The officer told her this was acceptable as long as she did not block traffic. She assured him she would not block traffic and the officer left and did not return. On that day, Nelson handbilled between 2:30 and 3 p.m. There was no evidence presented that supports a finding that the Union in any manner blocked the driveway. Office Manager Melendez testified that the driveway was only "almost blocked." Nelson handbilled on several subsequent occasions and was joined by employees Baker and Banks who had been discharged by the Respondent. It is undisputed that the Union was not on the property but was

only near the Respondent's driveway. Thus, Respondent's actions in calling the police constituted unlawful interference with the employees' right to handbill near the property in violation of Section 8(a)(1) of the Act. *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191-1192 (2007).

6. The alleged interference by Supervisor Sledge with Union Representatives and employees' right to engage in protected concerted activities near, but not on, Respondent's property

Baker testified that commencing on August 10th, when the Union handbilled for the second time, Supervisor Sledge drove up in Respondent's van and driving erratically came to within a few feet of Nelson and Baker. He then backed up a few feet, parked, and then watched Nelson and Baker engage in handbilling. Nelson said he was engaging in surveillance. He then yelled twice at Nelson to get off the property and threatened to call the police and put the telephone to his ear as if to call the police. Each subsequent time that Nelson, Baker, and Banks engaged in handbilling, he drove up in Respondent's van, parked by them, and observed their activities. I credit the foregoing un rebutted testimony. Sledge did not testify. I find that Respondent violated Section 8(a)(1) of the Act by the foregoing conduct by Sledge which interfered with the employees' rights to engage in protected concerted activities. *Sprain Brook Manor Nursing Home, LLC*, supra.

*B. The Discharge Allegations*

Patricia Baker was hired by Respondent as a CNA on June 6, 2006, and was discharged on August 7, 2007. She had worked as a CNA approximately 16 years. On July 16, at about 10:30 p.m., several employees were in the inside break room where smoking is permitted and were discussing problems on the job such as being overworked as a number of new residents with psychiatric problems were being admitted. The employees also discussed the lack of benefits. At this meeting her fellow employee, CNA Paris Banks, mentioned she had a friend who worked at another nursing home that had a union and that those employees were receiving benefits. Baker mentioned at this meeting that CMT Beverly Grover would be a good shop steward if the employees had a union as Grover was outspoken and helped other employees. The meeting of the employees ended that evening but there was no resolution or conclusions reached by the group concerning these problems. Baker personally asked DON Elaine Frauenhoffer and ADON Marty Taub on another occasion if Respondent was beginning to deal with the Department of Mental Health as they were getting a number of new residents who were mentally ill.

Following the July 16th discussion, Union Organizer Sharon Nelson came to the facility and met on Tuesday, July 31st, with employees in a small vending room which is part of the large dining room on the first floor. Baker saw Nelson briefly when Nelson was talking to the employees gathered in the vending area and spilling out to the larger dining room area. Other employees were excitedly saying that the union representative was there. This was between 2 and 2:30 p.m. Baker finished her rounds for the residents and then returned. On the first occasion when she saw Nelson talking to the employees, there were residents in the dining room with activities going on. Laura

Miloszewski, the activities director was also present. On the second occasion when she returned, there were many employees in the dining room as they could not all fit in the small vending area. On this occasion, Baker signed a union authorization card. Other employees were also signing union cards. Baker asked Nelson questions about the Union. Baker was due to leave her shift at 3 p.m. and agreed to take union cards for other employees to sign. She gave the cards to employee Shantel Ewing to obtain signatures from other employees on the oncoming shift.

On the next day (August 1st) about 2:30 to 2:40 p.m., employee Latasha Johnson told Baker that the lady from the Union was there and wanted to talk to her. Baker told her supervisor, charge nurse Randolph, that she was getting ready to take a break and would be right back. She went and talked to Nelson under a blue canopy on the outside of the facility where employees go to smoke. Nelson asked her if she had the cards signed. She said she would check with Ewing and did so. However, Ewing, who had been excited about the prospect of a union coming to represent the employees the day before, acted as if she did not want to talk to Baker and "brushed me off." Ewing said she did not know if the employees wanted to sign the cards or not. Baker returned to downstairs from the second floor where Ewing worked and saw Nelson in the building with the DON, Frauenhoffer and the ADON, Taub who were talking to Nelson. Baker then made a u-turn and talked to Rose Johnson, a patient in the first room nearby and then left this room and began to merge with Nelson who was coming out of the dining room with Frauenhoffer and Taub behind her. Nelson told Baker that Frauenhoffer and Taub had just told her to leave the property. Nelson asked her if the cards had been signed and Baker said she did not know and that Ewing had brushed her off. At that time, Frauenhoffer and Taub were coming behind them and Baker punched out and she and Nelson went out of the facility. Baker told Nelson she was feeling uncomfortable and nervous. Nelson asked her when she could get the cards signed and she told Nelson she did not know. She and Nelson both got in their cars and left.

On the next day (August 2), Supervisor Luther Sledge was sitting outside when Baker arrived at 7 a.m. and stared at her up and down. On that morning she overheard a conversation as discussed, supra, between Frauenhoffer, Taub, and Charge Nurses Marilyn Salome and Antoinette Randolph who were in the nurses' station on the first floor. Baker was in a patient's room nearby. She heard Frauenhoffer ask Salome and Randolph if they knew anything about a union representative being in the building the last 2 days and heard Taub ask the two nurses if they knew anything about this. Both nurses denied that they had heard anything about this. Baker testified that later that day around 1:30 to 2 p.m., she saw Sledge and Burgess and several housekeeping employees in the dining room as she was taking residents from the dining room as they were finishing their lunch. As discussed, supra, she came into the dining room to get another resident and she heard Burgess ask housekeeper Terrell Noble who the person was that was having employees sign union authorization cards to start a union. Noble just nodded his head toward Baker and they all looked over at Baker. Sledge said nothing. Between 2:30 and 2:45 p.m.

that day, she was called into the front office by Mary Melendez, the office manager. Inside the room were Frauenhoffer, Taub, and Sledge. Frauenhoffer told her she hated to do this to her but that "I have got to let you go." Melendez had told her that she had been "stealing time" by not clocking out and in for lunch. Baker had gone to lunch with Corneesha Pitts a CMT. They had gone to a Jack-in-the-Box, a fast food restaurant, and had brought their food back and gone upstairs to the second floor dining room to eat their lunch. Baker testified they were only gone from the facility for about 17 minutes. She testified further that Office Manager Melendez had come up to the dining room where they were eating and asked whether the employees wanted to participate in a 401K program and how much they wanted to contribute. Pitts did not clock out either. Baker testified she had previously gone out to lunch without punching out on the timeclock a number of times. A half hour lunch period is automatically deducted from the employees' hours regardless of whether they actually take lunch or not. Baker had, on other occasions, picked up carry-out lunches from restaurants and taken them back to the facility for other employees. In practice, employees do not clock out for lunch. Whenever she went out for lunch, she told the charge nurses. The Respondent's representatives have, up to the date of the hearing, never told her how much time that she allegedly stole.

Baker and CNA Paris Banks have been friends for over 20 years. As a result of this close friendship, Respondent has often asked Baker to call Banks to come in on her days off.<sup>2</sup> Baker called Banks on July 31st and Banks clocked in at 11 a.m. as Respondent needed additional help as more residents were coming into the facility. On the weekday of Tuesday, July 24, Banks was off work and the Respondent was short of help and they asked Baker to call Banks in.

Baker testified further that after she was discharged, she went back to the facility between 2 and 2:30 p.m. to get her paycheck on August 7th, which was a regular payday. She saw Nelson who was standing on the outside of Prigge Road<sup>3</sup> handing out pamphlets and talking with family members and some employees. She joined Nelson in doing this. When Baker was fired, she was walked out of the facility by Supervisor Sledge. She then called Nelson and told her she was fired and she told Nelson she did not know why she had been fired. Baker later worked for the Union and helped the Union give out handbills to employees and made telephone calls on behalf of the Union. On August 10th, Baker was outside of the facility and Sledge came "roaring up the hill" in Respondent's van and parked on the side of where they (Nelson and Baker) were standing. He told them to get off his property or he would call the police. On the day she was handing out pamphlets, Baker observed members of Respondent's management standing out under the blue tarp at the entrance.

Baker acknowledged that there was a rule that employees must clock out if they were leaving the building for lunch.

However, she testified that she "followed a pattern" of other employees who were not clocking out when they left the building for lunch. She personally did not clock out on about five occasions. Baker testified that on August 7th, Nelson parked her car on a little "dip" on the side of Prigge and Nelson and Baker were standing on the road handing out pamphlets and asking the employees coming into the facility to vote in the upcoming union election. After the August 7th payday, she went out to the facility to handbill three to four times and Sledge was there each time she went out there.

Paris Banks was hired as a CNA in June 2006 and worked a double shift of 16 hours on Saturdays and Sundays. She was not scheduled to work during the week due to a child care issue. She occasionally would work to fill in as requested by Respondent during the week. In July 2007, she was involved in a discussion in the breakroom among five or six employees concerning obtaining union representation. The employees were talking about their desire for union representation and more money, and benefits such as sick leave pay and time-and-a-half for overtime. She told the employees that she had a friend who worked at Abbey Care Nursing Home and that the Union had helped her as the employees had sick leave pay and insurance benefits. Respondent did not have any benefits. On Tuesday, July 31st, she was called in to work. She was on occasion called in to work on her days off. The nurse would call her in or sometimes ask her good friend Patricia Baker to call her in. On July 31, she learned from other employees that Union Representative Sharon Nelson was there and would like to talk to the employees about a union. She finished taking care of a resident and then went and talked to Nelson about 10 minutes. The employees were gathered in the first floor dining room. Banks asked Nelson if the employees would be fired if they signed the union authorization cards and Nelson said no. They also talked about how the Union could get them more money and benefits such as sick leave pay, time-and-a-half and insurance. She signed the Union's authorization card on that date and gave it to Nelson. On that same day, she went to Jack-in-the-Box with Patricia Baker and Corneesha Pitts. They all left the building at the same time. She did not observe anybody clock out. They went to the Jack-in-the-Box and bought something to go and came back to the building to eat their lunch in the upstairs dining room. She otherwise does not go out for lunch as she receives a free lunch for working on Saturdays and Sundays. On July 31, she left the building and came back within 30 minutes. On August 2nd, she received a telephone call from DON Frauenhoffer about 3:30 p.m. who said she was going to put her on a speakerphone with Sledge and Taub as Melendez had informed Frauenhoffer that Banks did not clock out when she went to lunch the other day and that she would have to terminate her. Banks asked why she had to terminate her and said she should write her up because this was her first time as she does not usually go out to lunch. Frauenhoffer said she was sorry but she had to terminate Banks. At this time, no one said anything about her attendance or about her coming in to work late. She had seen only one writeup signed by Frauenhoffer in February 2007 for being tardy on 3 days. She talked to Frauenhoffer at that time and told her she had a child care problem which caused her to be 10 or 15 minutes late. Frauen-

<sup>2</sup> Banks normally works two shifts on Saturday and Sunday and does not work during the week but does on occasion substitute when Respondent has a need of additional personnel.

<sup>3</sup> Prigge Road is a public road which leads to the entrance to the facility.



hoffer said this was fine and to get there as soon as she could. After this incident, she consistently came in late and Frauenhoffer did not say anything to her. She has never been a no-call/no-show.<sup>4</sup> She called Nelson on the day after she was fired and told Nelson they fired her for not clocking in. On the days when Banks was called in to work on a weekday, she was often called after the start of the shift and was actually not late when she came in after the start of the shift. However, Banks was consistently late in arriving for her normal shifts on Saturdays and Sundays and Respondent never disciplined her for this after the February 2007 warning. She received no further writeups, warnings, or discipline as a result of being consistently late. In its record of her attendance, Respondent states that she was late 6 out of 8 days of work and that she was 4 hours late on one occasion. However, this occasion was a day when Banks had been called to work after the start of the shift and she was not actually late. Although she and Baker were both discharged on August 2nd, Corneisha Pitts was not discharged.

Beverly Grover was hired as a CMT in March 2007. A CMT is a Certified Medical Technician. As a CMT, she hands out the medicine to the residents and also checks their temperature, pulse, and respiration. She also assists the licensed practical nurses (LPNs) in any type of Assisted Daily Living (ADL) activities such as insulin and Accu-checks. She can perform all the duties of a CNA. However, a CNA cannot perform the above-listed duties of a CMT. Grover worked the evening shift from 3 to 11 p.m. in July. She reported on a daily basis to the Charge Nurse, Nellie Smith. She reported to Frauenhoffer until Frauenhoffer left at 5 p.m. From that point on, she reported to Smith for the balance of the shift. In July, the subject of a union came up among several employees, including Patricia Baker, Paris Banks, and herself. They discussed their need for benefits. The discussion ended without any resolution by the employees that they were going to pursue the matter. Later, she met Union Representative Sharon Nelson on July 31. When she arrived for her shift that day, she was met by coworker Shantel Ewing who grabbed her and pulled her down the hall saying there was someone she wanted her to meet. Grover agreed to meet the individual and went to the vending machine area where there were other employees in the main dining room and the small vending area where Union Organizer Sharon Nelson was seated in a chair. When she entered the room, Ewing told Nelson that Grover was the lady she had told Nelson about who would be a good shop steward. Grover and Nelson then met and Nelson asked her if she would like to be a shop steward. She said she was interested and signed a union card on that date and handed it to Nelson. Nelson said she would contact her and give her information regarding the duties of a shop steward.

On August 2nd, Grover was out at the front of the facility smoking a cigarette and Taiisha Burgess came out of the door while Grover was sitting on a bench. Burgess said she did not know why the employees wanted a union as the Union would not back the employees. Burgess handed her a piece of paper. At the time there were two other employees sitting on the right

of Grover. Grover looked at the piece of paper which stated that employees would get paid on holidays, and set out the employees' rate of pay and pay raise. When Grover looked at the piece of paper, Burgess "snatched" the paper back. Grover testified that the paper was part of a contract at North Valley Manor where the employees are represented by the Service Employees International Union (SEIU). Burgess told Grover she believed that this was what the Union would do for her because she was at North Valley Manor and "they do not do shit for us." Grover then said that is your opinion and proceeded inside the building to return to work from her break. Grover testified further that she worked on August 3rd and was working in a resident's room as discussed, supra, about 4 to 4:15 p.m. when Frauenhoffer had her come out of the resident's room and then told her that if she brought this up, she would deny it. Grover asked her what she was talking about. Frauenhoffer said that there was a rumor going around that Grover was recruiting women for the Union. Grover denied this and said that she did not have anything to do with this. Grover worked on August 4 and 5, a Saturday and Sunday, and was scheduled to be off on Monday, August 6. When Grover worked the shift on August 4 she was in charge of orienting a new CMT with the medicine cart (med cart). The med cart contains all of the medication needed for each resident for that particular hall. Grover oriented the new CMT by taking her step-by-step over Respondent's procedure of passing out residents' medications. On Monday, August 6, Grover was called in to work early by Frauenhoffer and arrived at 7 a.m. She went to work and at 8:30 a.m. to 9 a.m., she was called into the office by Mary Melendez who told her she had not clocked in that day and that she was going to put Grover down for 10:30 to 10:45 a.m. that day. Grover said okay, but that she had clocked in. Melendez said okay and Grover asked her what the problem was. Melendez replied that she was getting ready to hand in the time for the payroll. Grover asked if she was free to leave the office and Melendez said yes. She was not disciplined for this.<sup>5</sup> Later, on August 6, Grover was paged to come to the office by Melendez. When she arrived at the office, she saw Melendez, Maintenance Supervisor Sledge, ADON Taub, and Frauenhoffer. Administrator Law was standing in the doorway of her office. Frauenhoffer was "red" and "upset" like she did not want to do this "but I have got to let you go." Grover asked what she had done. Frauenhoffer said she was terminating Grover for "misappropriate conduct on the med cart." Grover asked her what she had done and Frauenhoffer said "I cannot get into that right now." No one in the meeting mentioned any type of altercation. There was also no mention of any residents being afraid of her. Grover also testified that she could lose her license as a CMT if the residents were afraid of her. There has not been any complaint to the registration authorities. Grover's nursing supervisor, Nellie Smith, was working that weekend and available for any problems. Smith never came to her and told her that there were any complaints by residents.<sup>6</sup> August 7th was payday. Grover had been terminated the previous day.

<sup>4</sup> This is a situation where an employee does not call in to report that she will not be there and where she does not show up.

<sup>5</sup> Grover acknowledged that the day referred to by Melendez was August 1 rather than August 6.

<sup>6</sup> Smith was not called to testify in this case.

She went to Respondent's facility on August 7 to pick up her paycheck and also requested her "termination papers." On that day, she saw Nelson on Prigge Road handing out pamphlets informing employees that there was an upcoming union election. She also later saw Banks and Baker handbilling along with Nelson. She testified that there was no obstruction of traffic coming to and from the nursing home as a result of the handbilling. Grover went to the entrance of the facility along with her sister who drove her there. Grover was met at the door of the facility by Melendez who told her to stay there and she would get her paycheck. She did so and Melendez gave her the paycheck. She saw Administrator Law there and asked for her "termination papers." Law told her the papers would not be ready that day. During this time she saw a man coming out of the nursing home and asked who he was. He identified himself as Sharo Shirshekan, the owner. She told him she wanted to speak to him because she had been wrongfully terminated. He asked who she was and she told him her name and held out her hand to shake his hand. He stepped back and called in for Law to call the police to remove these individuals from his property. Law stepped out of her office. Grover asked for her "papers." Law told her she should call Frauenhoffer in the morning. Grover told Law "no" that she needed the papers now. The papers she was asking for refers to a document that listed the reason for her termination. Law then said the police are on the way. At that point, her sister got out of the car and told Grover to leave. The car was pulled over to the parking lot and Grover put the request for the "papers" in writing and it stated that she wanted to receive her termination papers in 30 minutes. Her sister brought the request into the facility. This was around 2:45 p.m. The police car arrived and she observed Law and the policeman give each other a "hug." At that point, Grover's sister, who was in the facility, came out and they left to wait for receipt of the "papers." The policeman did not say anything to Grover or her sister and they left to return in a half hour for the termination papers. When they returned, Grover's sister went back to the facility and was given an envelope with the termination papers. The envelope contained a statement that she was discharged for loud disruptive behavior. There is no mention of a medical cart, or residents being afraid of Grover. Grover does not recognize the name "G. Garage." She testified she did not get in Shirshekan's face.

Rashanda Barfield testified she was hired by Frauenhoffer in April 2007 as a CNA. She worked full time on the 7 a.m. to 3 p.m. shift. She met Organizer Nelson on July 31st in the dining room by the vending area. She learned from other employees that Nelson was there. She finished taking care of a resident and then went to talk to Nelson. She signed a union card which she received from Nelson. She does not know whether she was observed by management. On August 7th, she was called to a mandatory meeting attended by all the employees with Dr. Sharo Shirshekan who talked about the Union. He told them that if they voted for the Union, they would not get any raises. He also told them that it was up to them if they wanted to vote for the Union. He also told them that he owned four other nursing homes that had unions and he would deal with the Union if it were elected by the employees at this facility. After the meeting, Frauenhoffer handed out paychecks and asked

Barfield to step aside as she wanted to talk with her. After she finished handing out the paychecks, Frauenhoffer told Barfield that she was sorry but she had to let her go. Barfield inquired as to the reason and Frauenhoffer said it was because of her work performance. Barfield said, "you're kidding" and Frauenhoffer said yes because of your work performance. Barfield was unaware as to what she was referring to and she was not given anything in writing. During this discussion, Frauenhoffer did not say anything about her going to her car. After Frauenhoffer terminated her, she went to Law's office and told Law that she had just been terminated. Law asked her for the reason and Barfield said it was for poor work performance. Law did not say anything to Barfield about going to her car. Barfield had never been written up or disciplined. A termination notice for Barfield sets out that Barfield allegedly left work five times prior to lunch. Barfield testified that she went outside to get a pen from her car on only a single occasion on August 7th. Barfield testified that she had permission to go outside to her car on that occasion by Nurse Randolph or another charge nurse.

Union Organizer Sharon Nelson testified the Union represents four of Shirshekan's other nursing homes and she has not known him as other than the owner of those homes. The Union received an anonymous phone call around July 28 or 29 that said they needed a union at the Respondent. She then went to Respondent's facility on July 31 and arrived there between 2:15 and 2:30 p.m. She saw a young lady and told her the Union had received a phone call stating that the employees at this nursing home were interested in the Union. The young lady said yes and told her to wait in the vending area. She did so until three or four employees including Patricia Baker and Paris Banks came and left because they were not on break yet. When they went back, they relieved other employees for their break and then later returned to take their own break. She told the employees that the Union had received a telephone call stating that the employees were interested in forming a union and that it would be necessary to have a majority of the employees sign union authorization cards. The employees said they wanted a union and commenced to sign union authorization cards. She was in the vending area about 35 to 40 minutes. On the next day (August 1) she returned to Green Valley about 2:30 p.m. When she arrived she asked an employee, a young lady, if she knew Patricia Baker. The employee said she would get Baker. Baker came to the door, said she was not on break then but that Nelson could wait in the vending room and she would bring any cards to her. She waited for 25 minutes and Baker had not come yet. DON Frauenhoffer and ADON Taub approached her and told her she could not wait there. By this time, it was about 3 p.m. and the shift was leaving. Nelson proceeded to leave and Frauenhoffer and Taub walked behind her and she walked out the double doors at the hall and through the outside doors. She saw that Baker was ahead of her but she could not talk to Baker and she then walked faster to catch up with Baker. As Nelson got closer to Baker, Baker mumbled "they are watching me." As Nelson turned she saw that Frauenhoffer and Taub were watching them. Baker told Nelson she did not have any more cards signed. Baker and Nelson walked to their cars which were parked near each other and got into their respective

cars and left. On the next day, about 2:30 to 2:45 p.m., Baker called her and told her she had been terminated for “stealing time” for not clocking out for lunch. About 45 minutes later, Nelson received a telephone call from Paris Banks saying that she had been terminated for “stealing time.” The Union filed for an election on August 3rd. The election was set for September 7, 2007. The election was not held as a result of the unfair labor practice charges that were filed. On August 7th, Nelson commenced a handbilling campaign at the facility for a period of 5 or 6 days. The handbilling informed the employees of the filing of the election petition and informed the employees of their rights under the National Labor Relations Act. On about five occasions, Baker and Banks helped Nelson engage in the handbilling. August 7th was the first day that Nelson handbilled. She handbilled on Prigge Road (a public road) and parked her car on a grassy area on the side of the road. She handbilled from 2:30 to 3:20 p.m. A police officer approached her on that date and asked what she was doing. She told him this was an organizing drive and that she had a right to be there. He said this was fine as long as she did not block traffic on the road. She told him she would not block the road. Another police officer drove onto the facility about 15 minutes later. He went into the facility and came back out and drove by her without stopping or saying anything. She handbilled again on August 10th. This was the first day she met Luther Sledge. She began to hand out flyers and Sledge came up in the nursing home’s white van and pulled up within 10 feet of her face. He then backed up a bit and stayed in the van. She told Sledge that he did not have the right to engage in surveillance of the employees. Sledge told her to get off his property. She told him she was not on his property. Sledge then put his phone to his ear. At that time the vehicles began to go by rather quickly and did not take the flyers. One of the ladies yelled that they would get fired if they were seen talking to Nelson. She went back to handbill on several occasions. On August 13th about 2:30 to 2:35 p.m., Sledge again came up to her while she was handbilling and pulled up in front of her face again.<sup>7</sup> Patricia Baker and Paris Banks were present on an occasion when a verbal confrontation between Sledge and Nelson occurred.

Administrator Marilyn Law testified she has responsibility for all the financial and resident issues and oversees the department heads. Green Valley has been in operation since March 2004. There is an average of about 110 residents. The nursing home has about 80 employees. There are about 40 CNAs and five or six CMTs. There are also LPNs and RNs. Dr. Sharo Shirshekan is the manager of Green Valley and other nursing homes. She does not know if Dr. Shirshekan owns these nursing homes. There are four homes in the network in the St. Louis area. There are also some homes outside of the St. Louis area. The corporate office is in Farmington, Missouri, where Dr. Shirshekan is based. Taiisha Burgess is an employee of Green Valley who orders central supplies and handles medi-

cal records. She also works at two other nursing homes managed by Dr. Shirshekan. Laura Miloszewski is the activities director at Green Valley. She plans activities for the residents and has an assistant. Director of nursing (DON), Elaine Fraenhoffer reports to Law. The assistant director of nursing (ADON), was Marty Taub at the time of the incidents in this case. Taub has since resigned. There is a high turnover of employees at Green Valley. The employees do not quit but either do not come back to work or their attendance is so bad that the nursing home has to terminate them. Law signs off and approves the disciplines.

Law testified that the nursing and CNAs and CMTs work an 8-hour day. There are three shifts (7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m.). The employees receive a half-hour lunch for an 8-hour shift. If they eat in the facility, they do not need to clock out as the lunch is automatically taken out. If they leave the building, they must clock out. The Employee Handbook states “hourly employees should also check in and out for lunch.” Law testified that this statement does not differentiate, but that in practice, employees who stay in the building do not clock out and if employees leave the building, they must clock out. Baker was terminated for leaving the building without clocking out which is considered “stealing time.” The position of Respondent is that as long as they work five hours, Respondent will deduct their lunch period from payroll regardless of whether they take lunch or not. Law is unable to determine how much time Baker stole by taking lunch as Baker left without clocking out and Law does not know when Baker came back. Law acknowledged that if an employee went out and came back within a half hour, the employee would not be guilty of theft. Employees frequently go out for lunch and often take orders for other employees. Law contended that a person could not go to a Jack-in-the-Box, come back, and eat the lunch within a half hour but admitted she had not tried to do this. Law also admitted she did not know how many minutes Baker was gone. Law testified she believed that Banks was terminated for tardiness and absences. She testified that she was not aware that Banks went to lunch with Baker. Fraenhoffer told her that Baker did not clock out when she went to lunch. Law did not have personal knowledge of the circumstances with respect to Baker, Banks, and Grover, but Law personally saw Barfield walk past her office and go to her car five or six times without notifying the charge nurse. With respect to Banks, Law protested the award of unemployment compensation by the Missouri Division of Employment Security and asserted that Banks was terminated for misconduct because she “did not come to work.” However, Law testified she forgot to put down that Banks “did not come to work *on time*.”

With respect to Grover, Law testified that three of the residents complained to Fraenhoffer and to Law. She did not receive the complaints directly as the instances occurred in her off-duty hours on the 3 p.m. to 11 p.m. shift. She later talked to the residents who told her that Grover was very loud and they closed their door because they were afraid of her. She did not take a statement from the residents who complained about Grover. The complaints were investigated by Fraenhoffer. Grover was issued a disciplinary warning for speaking in a loud and aggressive manner in resident care areas on August 4 and

<sup>7</sup> At this point in the testimony, the General Counsel withdrew par. 5(f) of the complaint which alleges that “on August 31, 2007, Respondent by Maintenance Supervisor Sledge interfered with employees and union representatives engaging in protected concerted activity near, but not on, Respondent’s property by threatening to call the police.

5. These incidents were not reported to the State authorities but Grover was terminated on August 6. With respect to Barfield, she was terminated after Law observed her go to her car five or six times in a day. Law did not take any action or question Barfield after the first time Law observed Barfield go to her car. Law asked Frauenhoffer about this and Frauenhoffer started checking up on Barfield. Office Manager Mary Melendez also observed Barfield leaving as did staff who were all in the front office.

Law testified further that on August 7th, Shirshekan spoke to employees at a meeting at which he told the employees that it was everyone's right to join the Union, that this was up to the employees and that he would work with anyone. Law testified that on August 7th, she called the St. Louis County Police Department and they sent out a police car which was driven by a friend of her son. She called the police because Grover was out of control and yelling at her and Shirshekan and was in their faces. Grover got into her car when the police came and then left. Grover was yelling that she should not have been discharged and that she wanted Respondent's files and paperwork. The police officer did not talk to Grover. Before she left, Grover told Shirshekan that she wanted to talk to him and stuck her finger in his face and that is when Shirshekan went into the building. She then started coming after Law and yelling at her. Law testified that they called the police twice on August 7th. The second time they called 911 because the cars were blocking the curve coming around but no one showed up that they are aware of. Law testified she does not recall, or is not aware of, any instance when an employee has been discharged or disciplined for failing to clock out for lunch at Green Valley.

Respondent's records show that employee Conchetta Johnson was given a disciplinary warning on June 30, 2005, for being absent all day on June 10 and 13, and tardy on June 18, 19, 20, 23, and 27, 2005. Johnson was not discharged. Conchetta Johnson also received a disciplinary warning for February 2 and 14, 2006, and was not discharged for those instances of absence either. Additionally, Conchetta Johnson received another warning for absenteeism from March 3 to 10, 2006. A disciplinary warning was issued to Reonda Alston for absences on June 2, 13, and 19, and tardiness for June 16, 18, 22, 24, and 30. Alston was not discharged in these instances. She subsequently resigned on September 26, 2005. Employee Valencia Burns was tardy on October 19, 21, 22, 24, 26 and 31, 2006, and received a verbal warning but was not terminated for these tardies. The General Counsel's Exhibit 25 is a termination. Law also testified that a number of these instances pre-date Frauenhoffer's becoming the director of nursing.

Office Manager Mary Melendez testified that on August 2nd, at Frauenhoffer's request she pulled up a report from the computer showing that Patricia Baker had not clocked out for lunch. This is the same day that Baker was terminated for failing to punch out for lunch for "stealing time." Melendez was present at the facility and observed an exchange between Beverly Grover and Sharo Shirshekan. Grover was on the outside of the glass door and Melendez was on the inside of the door. Shirshekan was outside and Grover was loud and very close to him and almost touching him and he went inside as the glass doors closed, Grover tried to come in but Sledge held them closed

and Grover could not come in. Melendez observed the union handbilling on Prigge Road. She testified that the Union was "almost" blocking the entrance driveway for Green Valley. She further testified that the handbillers were causing congestion as it was during shift change. Melendez further testified that she seldom left the facility for lunch because there is nowhere around there that is close. On August 7th, there was an issue regarding Grover's asking for her termination papers and that they were not ready and Grover had to leave the facility and then return to get them.

DON Elaine Frauenhoffer testified she is a registered nurse and has responsibility for the welfare of the residents concerning everything related to the nursing department such as hiring, disciplining, and scheduling. She does not remember the day or date but shortly after the shift change, she brought Grover to a small alcove area near the nurses' station and told her that any kind of union discussion must be away from the patient care area and on her break or off the property. She did not tell Grover that she had heard a rumor that she was a union organizer and had asked if this was true. A resident had approached her and told her that the night before, Grover was loud at the nursing station talking about union activity. She made the decision to discharge Grover because she heard on August 6 that Grover had engaged in unprofessional behavior. The next day, Frauenhoffer was apprised by four residents that Grover was very loud in the halls and two of them had closed their doors to keep her away and that they were afraid of her. She may have called Grover in to work on August 6 as it was not her scheduled work day. However, she would have called Grover in prior to having heard from the residents on that day concerning Grover's conduct in the resident halls. She met Union Organizer Sharon Nelson after Miloshewski, the activities director, informed her that there was a woman by the snack machines and that employees were going back to visit her. She approached Nelson and asked her who she was there to see. Nelson said she was waiting for an employee named "Pat" but did not know her last name. There were a couple of Pats working for her. She told Nelson she must wait for "Pat" in the front of the building. She walked up with Nelson as she exited the building.

Frauenhoffer discharged employee Paris Banks. She testified that she reviewed the attendance and tardiness records for the previous month at the beginning of the new month on August 2nd. Banks' records were "pretty blatant" and she terminated her. She does not recall whether Banks ever approached her to discuss a family situation. Banks worked weekends so there would not have been any school issues. Banks often told her at pay times, that if she needed help to call her and she would come if she were free. On the day of Banks' discharge, Frauenhoffer wrote "6 out of 8 days of working this employee has clocked in late. One day 4 hours late. This has been an ongoing problem that she has been written up for before." She did not present Banks with that notation. Frauenhoffer later noted that Banks was not 4 hours late as the reference to the 4 hours late was in error as this was an add-on day. However, Banks was never presented with this information as she discharged Banks over the telephone and Banks was not presented with the actual attendance record because when she called

Banks to tell her she was going to be discharged, Banks said, “Yeah I already know” and hung up. However, she still would have discharged Banks even if the 4-hour late day had been corrected. Former ADON Marty Taub witnessed this telephone call on the speaker phone. Frauenhoffer testified she reviews the employees’ attendance records at the end of the month. If there are only two absences, she usually let it go unless it is a monthly pattern. If there are three absences in a month, she gives them a writeup. She does not know if Banks was tardy between the time of her last writeup and her discharge. Banks was tardy a lot. She did not discharge Banks before August 2007 because she did not have anyone to replace her.

Frauenhoffer testified she made the decision to discharge Patricia Baker. She witnessed Baker leaving the building with another employee and told Office Manager Mary Melendez to pull up her timesheet to see if they had clocked out. They had not. Green Valley has a rule requiring employees to clock out if they are leaving the building for lunch to assure that they are only paid for the time they are actually working and because she needs to know who is in the building at any given time of day in case of disaster relief, fire, or a need for assistance or a call from their childrens’ school. On Baker’s discharge notice, she wrote “stealing time” as the reason for the discharge. When an employee has left the building, they are not giving patient assistance and are not helping their coworkers. They are required to clock out as there would be additional time than just the 30-minute automatic lunch punch as it requires a minimum of a half hour to go to the nearest fast food restaurant and back again. She also observed former employee Corneisha Pitts leave to go to lunch with Baker. She also checked if Pitts had clocked out for lunch. She had not done so. She did not discharge Pitts because she was a certified medication technician and hard to replace and thus was a more valuable employee as they have a vital role in medication distribution. CNAs are not allowed to pass out medication. She gave Pitts a disciplinary warning for failing to clock out for lunch. This warning also cites Pitts for “stealing time” for not clocking out. She subsequently discharged Pitts for leaving to go to a shopping center to pick up a job application after being told by a nurse that she could not go because it would take in excess of a half hour to get there and back.

Frauenhoffer testified she made the decision to discharge Rashanda Barfield because she was observed by Administrator Law going to her car five times in a 2½-hour period. She terminated Barfield on payday August 7th as she was handing out paychecks to the employees. She told Barfield to wait until she was finished handing out the paychecks. At first, Barfield denied it but when she told Barfield that Administrator Law had seen her, she no longer denied it but cried and asked Frauenhoffer to give her another chance. She did not say that she had permission of the charge nurse. Barfield told her she was talking on the phone. Her decision to discharge Barfield did not have anything to do with union activities. Neither did her decision to discharge Baker have anything to do with union activities. The topic of Grover’s conversation about unions did not cause her to discharge Grover. Rather, it was Grover’s conduct that led to her discharge.

Frauenhoffer testified that four residents came to her con-

cerning Grover and complained that she was “being very loud going up and down the halls, going rah-rah for the Union” and that they were very frightened. Frauenhoffer did not discuss this with the employee that Grover was orienting that day. She assumes that when a resident makes a complaint, that the resident is correct. She dismissed Grover for her behavior and loudness in a patient care area. If there had been abusive language, Grover would have been investigated by the State. She told Grover not to conduct union business in patient care areas. Grover engaged in conversation about the Union on August 4th which was overheard by a resident who reported it to Frauenhoffer in the afternoon of August 6 when the resident saw Frauenhoffer. Frauenhoffer then brought Grover aside and told her she could not conduct union business in patient care areas but only on her break or off the premises. Although she discharged Baker for stealing time by failing to punch out for lunch on the timeclock, she does not know how much time she stole. In her view, if someone does not clock out for lunch, they are automatically terminated if they leave the building. Employees are not required to clock out for lunch if they do not leave the building. She is aware that there is an investigation when there is a complaint against an employee and the residents are interviewed where there is suspected abuse. CNAs are supposed to tell the charge nurse when they go to lunch and to report back to the charge nurse. She did not review the work records of Baker and Pitts to determine whether one was more culpable than the other. She called Banks at home to inform her she was discharged but Banks did not give her the chance to inform her of the reason for her discharge because Banks said “Yeah, I already know” and hung up the telephone. This occurred in the afternoon after she discharged Baker. Thus, Banks and Baker were discharged within less than an hour of each other. She gave information to the Missouri Division of Employment Security indicating that attendance was the reason for the discharge of Banks but did not correct the incorrect designation of four hours late on the occasion when Banks had been called in during a shift. In its response to the Missouri Division of Employment Security, Respondent stated that Baker was terminated for stealing time. In Respondent’s response to the Missouri Department of Employment Security, it states that Banks was late 6 out of 8 days. Green Valley tells the Missouri Department of Employment Security that Banks did not come to work. In its Position Statement given to the Board, Respondent states that Banks was discharged for failing to clock in and out for lunch and because of her significant tardiness. Frauenhoffer testified that she checked with Barfield’s charge nurse but she did not document her response. There was no attempt to contact Barfield and question her concerning each of the five times she allegedly went out to her car.

### *C. Analysis and Conclusions*

I find that the General Counsel has established prima facie cases that Baker, Banks, Barfield, and Grover were engaged in union activities, that Respondent had knowledge of this and had animus as documented by 8(a)(1) violations and the record as a whole and that Respondent took adverse actions against each of these four employees by discharging them within a week of their having signed union authorization cards.

I find the reasons advanced for the discharge of these four employees were pretextual and support findings that their discharges were in retaliation for the employees' union activities. *Shattuck Denn Mining Corp. v NLRB*, 362 F.2d 466 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd. 705 F.2d 799 (6th Cir. 1982).

In the event that an analysis under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is necessary, I find that the General Counsel has established prima facie cases in each of the cases in this matter. In each case, Baker, Banks, Barfield, and Grover were engaged in protected concerted activities in support of the Union, the Respondent had notice thereof, the Respondent had animus against the Union and took adverse actions by discharging each of these individuals. I find that Respondent has failed to rebut the prima facie cases by the preponderance of the evidence and has failed to demonstrate that it would have disciplined and discharged Baker, Banks, Barfield, and Grover in the absence of their engagement in protected activities. I find that the timing of the four discharges within less than a week of the initiation of the union campaign in and of itself supports a finding of unlawful motivation. I find that the reasons advanced by the Respondent in support of the discharges were pretextual and were not the true reasons. I find that the evidence in this case clearly establishes disparate treatment as the adverse actions taken against these four employees were not taken against other employees for similar offenses.

With respect to Baker, the Respondent quickly identified her as a union supporter by the encounter with Union Organizer Nelson and the presence of Baker as she and Nelson walked out to their cars and were observed by DON Frauenhoffer and ADON Taub on August 1st. The next morning on August 2nd, Baker was identified as the person soliciting union cards by employee Terrell Noble in the presence of Supervisor Sledge. In less than an hour, Baker was called into a meeting in the presence of Taub, Sledge, Melendez, and DON Frauenhoffer who told Baker she was being discharged for "stealing time" by not clocking out for lunch. Baker testified that it was not an unusual occurrence for employees to go out of the building to buy their lunch at fast food restaurants to return to the facility for consumption within the space of the allotted half hour without clocking out and back in. Respondent's records show that Baker's discharge was the only instance wherein any discipline, much less a discharge, had ever been issued to an employee for failing to clock out for lunch when the employees left the building to buy their lunch at a fast food restaurant for a return to Green Valley for consumption on the premises. This un rebutted evidence clearly demonstrates disparate treatment as Baker was singled out for discharge. Although Baker went to lunch with Pitts and Banks, Pitts was not discharged but was rather only issued a warning for doing so. Frauenhoffer testified this was because Pitts was a certified medical technician (CMT). However, Pitts was subsequently discharged along with another CMT for leaving the premises to obtain job applications at a shopping mall. This certainly undercuts Respondent's argument that Pitts was not discharged because she was a more valuable employee than Baker who was a CNA. With respect to whether an employee could leave the premises, buy her

lunch, and return for consumption of the lunch on the premises within the allotted half hour, Frauenhoffer admitted that she did not know whether Baker had accomplished this within a half hour. Administrator Law testified she would need to know what time Baker left and when she returned and ate her lunch. It is clear that these calculations were not made. Rather, Baker was summarily discharged.

Banks was called on the telephone on the same day and within less than an hour of Baker's discharge and put on a speaker phone in the presence of Supervisor Sledge and ADON Taub. Banks testified that she was told by Frauenhoffer that she was being discharged for not clocking out. Banks testified she asked Frauenhoffer not to discharge her as this was the first time she had gone out to lunch but that Frauenhoffer refused. Frauenhoffer testified that when she called Banks, that Banks said "I already know" and hung up. I credit Banks' specific testimony in this regard. Banks' testimony was corroborated by Nelson who testified that Banks told her she was discharged for failing to clock out for lunch. Frauenhoffer then issued Banks a "disciplinary warning" on that date (August 2) in which she checked the category "Discharge" for that date for clocking in late 6 out of 8 days and being 4 hours late on one day and noted that Banks had been "written up" before for this ongoing problem. However, in its position statement filed with Region 14 of the Board, Respondent stated that Paris Banks was discharged "for attendance issues, not merely for failure to clock in and out for lunch (or in retaliation for union activity) as alleged in the Charge." The foregoing demonstrates a shift in Respondent's defenses by adding a defense of attendance as the reason for the discharge of Banks. However, a review of Banks' record demonstrates that Banks had been consistently late after she had talked to Frauenhoffer in February 2007 and explained her need to be late and had not received any additional warnings since that time until her discharge of August 2. Respondent's records further show that many of its employees are consistently late and that Respondent tolerates this situation and only discharges employees when they are absent from work as opposed to merely being late because of its high turnover of employees to do this difficult work and because it needs the employees to fully staff its facility. Thus, it is preferable from Respondent's business point of view to tolerate tardiness as opposed to absenteeism in order to keep its facility fully staffed. I find that both of the alleged reasons given by Respondent for the discharge of Banks are pretextual and demonstrate disparate treatment by Respondent's tolerance of tardiness on the part of its other employees while discharging Banks for this asserted reason. The record testimony also demonstrates that Respondent tolerated other employees leaving the facility for lunch without clocking out and in but seized on the failure of Baker and Banks to do so in order to rid itself of Baker who had been identified as a leading union adherent and to rid itself of Banks who was Baker's close friend and who Respondent thereby concluded was also a union supporter. Moreover, the timing of Banks' discharge within an hour of Baker's discharge is in and of itself conclusive proof that the discharges of Banks and Baker were inextricably intertwined.

In the case of Grover, Frauenhoffer was aware of her support of the Union as she conceded that she had warned Grover not to

discuss the Union in work areas and in residents' rooms. I credit Grover's account of this incident and that Frauenhoffer told her she would deny the incident if Grover mentioned it to anyone. In considering Grover's testimony, I note that she is outspoken and was assertive of her position. As the General Counsel urges in brief, Grover did not attempt to modify her testimony or put forward any excuses for her conduct on the nights of August 4 and 5. Rather, she testified that there were no problems and that she spent most of the evening of August 4th orienting a new CMT in the passing out of medications to the residents. Although both Administrator Law and DON Frauenhoffer testified they received complaints about Grover's allegedly loud conduct involving the Union, they did not initiate an investigation to determine whether there was any threat to the residents or any intimidation of them. Frauenhoffer contended at hearing that the resident is always right and that there is no need to investigate as a result. Such a position is not worthy of belief as many of the residents in this case are afflicted with disabling and chronic mental conditions and it is not plausible that the Respondent would prejudice any situation involving an allegation of abuse of a resident and summarily discharge an employee without having made a detailed investigation. It is significant that the Respondent did not investigate the matter by interviewing the new CMT whom Grover was charged with orienting on how to pass out medications to the residents. Surely, if Grover had been acting inappropriately during this period, the CMT would have been aware of it. Moreover, there is no evidence that Frauenhoffer interviewed the charge nurse who was on duty on the evenings of August 4th and 5th. Rather, on the morning of August 6th, Frauenhoffer discharged Grover for "inappropriate use of the med cart." In response to Grover's questions as to what she had done to warrant her discharge, Frauenhoffer told her she did not have time to discuss the matter. It was not until Grover appeared on payday on August 7 to get her paycheck and demanded her termination notice that she received and was ultimately given a second reason for her discharge, on the ground that she had conducted herself in a loud manner which intimidated certain of the residents. It is thus clear that Respondent engaged in disparate treatment of Grover. It is vital that a nursing home must be operated with proper care and freedom of abuse so as to provide a safe and protected home for the residents. However, I find that in this case, the Respondent seized upon purported complaints by residents of inappropriate loud behavior on the part of Grover. Rather, than investigating the situation, the Respondent summarily discharged Grover.

With respect to Respondent's assertion that Grover is not entitled to relief of reinstatement and backpay because of her conduct on August 7th when she appeared on that date to collect her pay on that payday, I find this contention is without merit. It is clear that Grover, by her own testimony, was "pissed" as a result of her discharge and Respondent's failure to give her an explicit reason for her discharge. She testified that she saw Shirshekan, the operator of the nursing home, and extended her hand to shake hands and told him she wanted to talk about her discharge but that he withdrew from doing so and directed Law to call the police which she did. However, I do not credit Law's and Melendez's testimony that Grover physi-

cally touched him or otherwise threatened him. I note that Shirshekan himself was not called to testify. I find that the conduct of Grover in loudly insisting on her termination notice was not so egregious as to warrant the denial to Grover of the relief of reinstatement and backpay afforded under the Act.

With respect to Barfield, I credit Law's testimony that she observed Barfield go to her personal automobile in the parking lot on five occasions. I find this testimony was specific and consistent. However, I find that Frauenhoffer's summary discharge of Barfield was motivated by Barfield's participation in protected concerted union activities. In making this determination, I find that the General Counsel has established a prima facie case that Barfield engaged in union activities by meeting with Union Organizer Nelson and signing a union card in the vending room area of the dining room on July 31 in the presence of Activities Director Miloszewski who was conducting activities for the residents in the dining room on that date. I find the evidence is sufficient to establish that Barfield was identified as a union supporter as Frauenhoffer testified that Miloszewski informed her of a lady meeting with the employees in the dining room. Moreover, Frauenhoffer interrogated LPNs Salome and Randolph as to whether they knew of a union organizer meeting with employees in the last 2 days. This gives rise to a finding that Barfield was identified as a union supporter. I credit the testimony of Frauenhoffer that Barfield at first denied that she had gone out to her car five times but when Frauenhoffer told her that Law was the person who identified her, that Barfield admitted to having gone to her automobile on five occasions, cried and admitted that she had gone to her car to talk on the telephone. Respondent's discharge of Barfield is tied to the other three discharges in this case as a result of the close timing of this discharge to the discharge of the other three employees. There is also significant evidence of disparate treatment in this case whereby the Respondent tolerated shortcomings in other employees. Barfield had not received any prior disciplines. I find that Barfield engaged in union activities by signing a union card and engaging in discussion with Nelson concerning the Union. The evidence is sufficient to support a finding that Respondent had knowledge of Barfield's engagement in union activities. This finding is amply supported by the close timing of these four discharges within a week of the initiation of the Union's campaign. It is undisputed that Barfield was the recipient of adverse action by Respondent's discharge of her. I find the General Counsel has demonstrated a link between the Respondent's knowledge of Barfield's engagement in union activities, its union animus, and the adverse action taken against Barfield. I thus find that the General Counsel has established a prima facie case that Respondent took the unlawful action because of Barfield's engagement in union activities. I do not credit Respondent's contention that Barfield was terminated solely because of the repeated instances when she went to her automobile. I, accordingly, find that the Respondent has failed to rebut the prima facie case by the preponderance of the evidence and that her discharge by Respondent was violative of Section 8(a)(1) and (3) of the Act.

## CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by the interrogation of its employees by DON Frauenhoffer and ADON Taub concerning their union activities and the union activities of its employees.
4. Respondent violated Section 8(a)(1) of the Act by the interrogation of its employees concerning who was distributing union authorization cards.
5. Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Beverly Grover by Director of Nursing Elaine Frauenhoffer concerning her union activities in organizing on behalf of the Union.
6. Respondent violated Section 8(a)(1) of the Act by its interference with lawful handbilling by the Union near, but not on, property occupied but not owned by the Respondent by calling the police because employees and a union representative engaged in these protected union activities.
7. Respondent violated Section 8(a)(1) of the Act by Maintenance Supervisor Sledge's interference with a union representative and employees engaging in protected concerted activities near, but not on, Respondent's property by instructing them to leave and threatening to call the police if they did not leave.
8. Respondent violated Section 8(a)(1) and (3) of the Act by the discharges of its employees Patricia Baker, Paris Banks, Rashanda Barfield, and Beverly Grover because of their engagement in protected concerted activities on behalf of the Union.
9. The aforesaid actions in connection with Respondent's status as an employer affect commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act and post the appropriate notice. It is recommended that Respondent cease the unlawful interrogation of its employees concerning their union activities and those of their fellow employees and that Respondent cease the unlawful interference with the lawful handbilling engaged in by union representatives and employees and that Respondent rescind the discharges of Patricia Baker, Paris Banks, Rashanda Barfield, and Beverly Grover, and offer immediate reinstatement to these employees. These employees shall be reinstated to their prior positions, or, if those positions no longer exist, to substantially equivalent ones. These employees shall be made whole for all loss of backpay and benefits sustained by them as a result of the Respondent's unfair labor practices. All of the backpay amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987), at the "short term federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

## ORDER

The Respondent, Green Valley Manor, L.L.C., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Interrogating its employees concerning their engagement in protected concerted activities and those of their fellow employees in support of the Union.
  - (b) Interfering with lawful handbilling by the Union and its employees on behalf of the Union.
  - (c) Discharging its employees because of their engagement in protected concerted activities.
  - (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the discharges of Patricia Baker, Paris Banks, Rashanda Barfield, and Beverly Grover, and offer them full reinstatement to their former jobs, or, if their jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights and privileges previously enjoyed and expunge from its files the unlawful discharges issued to these employees.

(b) Make whole these employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its St. Louis, Missouri facility copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the

<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2007.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 22, 2008.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO  
Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT interrogate our employees concerning their union activities and the union activities of our employees.

WE WILL NOT interfere with the union activities of our employees.

WE WILL NOT discharge our employees because of their engagement in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discharges of Patricia Baker, Paris Banks, Rashanda Barfield, and Beverly Grover, and offer them reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Patricia Baker, Paris Banks, Rashanda Barfield, and Beverly Grover whole for any loss of earnings and other benefits as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and, WE WILL, in writing, within 3 days thereafter tell them that this has been done and that the unlawful actions will not be used against them in any way.

GREEN VALLEY MANOR, L.L.C.